UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DEBRA ZANETTI and DANIEL TRONGONE, on behalf of themselves and others similarly situated, Plaintiffs, v. IKO MANUFACTURING, IKO INDUSTRIES, LTD., IKO SALES, LTD., IKO PACIFIC, INC., and IKO CHICAGO, INC., Defendants.	Case No. 09-cv-02017

MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION TO STAY PROCEEDINGS PENDING DECISION BY THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

The parties agree that this Court should temporarily stay proceedings pending a decision on the motion to transfer ("MDL Motion") of Defendant IKO Manufacturing Inc. because a stay will conserve judicial resources and eliminate the risk of inconsistent pretrial rulings. Similar actions are pending in other federal district courts that may be transferred with this action before one federal judge. In addition, the parties agree that temporarily staying this action will not prejudice any of the parties to this litigation.

BACKGROUND

This case is one of four putative class actions currently pending in four federal district courts in New York, Illinois, New Jersey, and Washington:

A. *Czuba v. IKO Manufacture, Inc.*, Case No. 1:09-cv-00409-WMS (Western District of New York)

B. *McNeil v. IKO Manufacturing, Inc.*, Case No. 1:09-cv-04443 (Northern District of Illinois)

C. *Zanetti v. IKO Manufacturing, Inc.*, Case No. 2:09-cv-02017-DRD-MAS (District of New Jersey)

D. *Hight v. IKO Manufacturing, Inc.*, Case No. 2:09-cv-00887-RSM (Western District of Washington)

The plaintiffs in these actions allege that roofing shingles manufactured by IKO Manufacturing, Inc. and installed on homes purchased by the plaintiffs failed prematurely. Collectively, these four actions are referred to as the "IKO Roofing Shingle Actions."

On August 6, 2009, IKO Manufacturing, Inc. submitted for filing with the JPML its MDL Motion seeking to transfer the IKO Roofing Shingle Actions for coordinated or consolidated pretrial proceedings. On August 27, 2009, Plaintiffs responded to the MDL Motion, and joined in the request for transfer of the IKO Roofing Shingle Actions. The parties therefore agree that the IKO Roofing Shingle Actions should be transferred.

Plaintiffs and IKO Manufacturing, Inc. (collectively referred to as the "Moving Parties") are jointly seeking a stay of all of the IKO Roofing Shingle Actions pending the JPML's ruling to help ensure that cases proceed at the same pace to avoid waste, duplication of efforts and conflicting pretrial rulings. The Moving Parties are contemporaneously filing similar motions for a stay in the other three IKO Roofing Shingle Actions.

ARGUMENT

This Court possesses an inherent power to stay proceedings before it. *Landis v. North Am. Co.*, 299 U.S. 248, 254-55 (1936) ("the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants"). Courts routinely exercise this inherent authority to stay pretrial proceedings during the pendency of a motion to transfer pretrial proceedings pursuant to 28 U.S.C. § 1407. *See Nekritz v. Canary Capital Partners, LLC*, No. 03-5081, 2004 U.S. Dist. LEXIS 12473, at *6 (D.N.J. Jan. 12, 2004) (Debevoise, J.) (granting a stay to "permit the most efficient possible use of the courts' and the parties' resources, and it will eliminate the danger" of inconsistent decisions)[1]; David F. Herr, "Multidistrict Litigation Manual: Practicing Before the Judicial Panel on Multidistrict Litigation," § 3:15 at 32

(noting that "[d]istrict courts. . . readily stay[] proceedings pending a Panel decision."). That is because interim stays: (1) promote judicial economy; and (2) avoid inconsistent results among district judges in different district courts. *Nekritz*, 2004 U.S. Dist. LEXIS 12473, at *6; *see also Arthur-Magna, Inc. v. Del-Val Fin. Corp.*, No. 90-4378, 1991 U.S. Dist. LEXIS 1431, at *4 (D.N.J. Feb. 4, 1991) (granting a stay to conserve judicial resources).[2]

An interim stay in this case, put into place while the JPML decides the MDL Motion, will serve both goals while allowing the JPML a reasonable opportunity to rule on the MDL Motion. *See Nekritz*, 2004 U.S. Dist. LEXIS 12473, at *6 (finding that "judicial economy will be best served" by allowing the transferee court to decide a pending motion); *Arthur-Magna*, 1991 U.S. Dist. LEXIS 1431, at *4 (staying all discovery until the JPML's transfer decision to conserve resources); *Johnson v. AMR Corp.*, No. 95 C 7659, 1996 U.S. Dist. LEXIS 4172, at * 11 (N.D. Ill. Apr. 3, 1996) (concluding that "the best course is to postpone ruling on the present motions. . . and allow the MDL panel to determine whether to make its conditional order final.").[3]

First, staying proceedings in this action will avoid forcing the parties to engage in duplicative pretrial practice. If numerous courts, including this Court,

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[1] A true and correct copy of this unpublished decision is attached as Exhibit A.
[2] A true and correct copy of this unpublished decision is attached as Exhibit B.

proceed with pretrial matters in advance of any decision by the JPML, then the efforts of this Court and the other courts (and the litigants in the actions over which the courts preside) might needlessly be repeated, perhaps many times over. Even worse, the efforts of these courts might be negated by any inconsistent decisions of any transferee court.

On the other hand, if this Court stays these proceedings and the JPML grants the MDL Motion and transfers all of the IKO Roofing Shingle Actions before a single judge in a single district court, the transferee court will be able to develop a common sense pretrial program that will ensure that the parties do not engage in duplicative work and will "conserve the resources of the parties, their counsel and the judiciary." *In re Musha Cay Litig.*, 330 F. Supp. 2d 1364, 1365 (J.P.M.L. 2004); *see also In re FedEx Ground Package Sys., Inc., Employment Practices Litig. (No. II)*, 381 F. Supp. 2d 1380, 1381-82 (J.P.M.L. 2005) (noting that the transferee court has the ability to "structure pretrial proceedings to consider all parties' legitimate discovery needs while ensuring that common parties and witnesses are not subjected to discovery demands that duplicate activity that will occur or has already occurred in other actions."); *In re M3Power Razor Sys. Mktg. & Sales Practices Litig.*, 398 F. Supp. 2d 1363, 1364-65 (J.P.M.L. 2005) (same);

[3] A true and correct copy of this unpublished decision is attached as Exhibit C.

In re IDT Corp. Calling Card Terms Litig., 278 F. Supp. 2d 1381, 1381-82 (J.P.M.L. 2003) (same).

Indeed, upon transfer, the plaintiffs in all of the actions will likely file a single consolidated complaint. *See* 8 Moore's Federal Practice, § 42.13[5][a] at 42-30.1 (noting advantages of consolidated complaints as a management tool for complex litigation). Such a consolidated complaint could allow IKO Manufacturing, Inc. and any other defendant to answer or move for dismissal, once rather than four times (or more).

Second, staying the proceedings in this action and ultimately coordinating this action with the other IKO Roofing Shingle Actions before a single federal judge will allow the judge to consider any common legal and factual pretrial issues together. *See WorldCom*, 244 F. Supp. 2d at 905-06. This approach would eliminate the risk that inconsistent decisions would be reached simultaneously by different federal district judges deciding common issues involving the same parties and the same putative classes. *See* 28 U.S.C. § 1407(a); *In re Air Crash Near Kirksville, Mo.*, 383 F. Supp. 2d 1382, 1383 (J.P.M.L 2005) (noting that consolidation will "prevent inconsistent pretrial rulings").

Third, the entry of an interim stay will serve as a courtesy to the members of the JPML, who in addition to serving on the JPML are members of the federal circuit and district court benches. 28 U.S.C. § 1407(d). These judges presumably

have dozens of cases under their regular docket over which they preside that also require their attention. Staying this proceeding for a short of amount of time will allow the JPML judges a reasonable amount of time to rule on the MDL Motion.

Finally, the parties agree that an interim stay will not unfairly prejudice any of them. The litigation is still in the early stages as only a complaint has been filed. No responsive pleading has been filed and no discovery has been taken. If the MDL Motion is granted, and this case is transferred with the other actions, then the parties will have an opportunity to raise pretrial matters with the transferee court at the appropriate time. *See Nekritz*, 2004 U.S. Dist. LEXIS 12473, at *6. Under these circumstances, no party to this litigation faces unfair prejudice from the requested stay.

CONCLUSION

A temporary stay of these proceedings while the JPML decides IKO Manufacturing, Inc.'s MDL Motion is appropriate. It will help avoid duplicative pretrial motion practice and discovery, and will minimize the risk of there being inconsistent decisions in the multiple IKO Roofing Shingle Actions. In addition, none of the parties will be prejudiced by a temporary stay. Accordingly, the Court should stay all pretrial proceedings in this case pending the JPML's decision on the MDL Motion.

Dated: September 22, 2009

Jointly and respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2009, I served a copy of the foregoing document to all counsel of record via the ECF/CM document filing system.

/s/ Vanessa M. Kelly

EXHIBIT A

LEXSEE

Cited
As of: Sep 22, 2009

YAAKOV NEKRITZ, individually and on behalf of others similarly situated, Plaintiff v. CANARY CAPITAL PARTNERS, LLC; CANARY INVESTMENT MANAGEMENT, LLC; JANUS CAPITAL MANAGEMENT LLC; and JANUS CAPITAL GROUP, INC., Defendants

Civ. No. 03-5081 (DRD)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2004 U.S. Dist. LEXIS 12473

January 12, 2004, Decided

NOTICE: [*1] NOT FOR PUBLICATION

DISPOSITION: Defendant's motion for stay of proceedings pending decision on motion for transfer by Judicial Panel on Multidisrict Litigation granted. Plaintiff's motion for remand to Superior Court of New Jersey denied without prejudice.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff investor on behalf of all similar investors sued defendants, financial management companies and a privileged customer, in state court for state law claims, alleging that defendants either engaged in or permitted improper trading in mutual fund shares. Defendants removed the action and moved for a stay of the proceedings pending a decision on transfer by the Multi-District Litigation (MDL) Panel. Plaintiff moved for remand.

OVERVIEW: Because it appeared that the interests of judicial economy were best served by a stay, with little or no disadvantage to plaintiff, the motion for a stay of proceedings was granted, and the motion for remand was denied. Plaintiff argued that the case was not one where it was appropriate to postpone consideration of the remand motion. Defendants argued that consideration of the remand motion permitted the most efficient possible use of the courts' (and the parties') resources because if the MDL Panel transferred the case and other similar removed cases, the transferee court would be able to consider several remand motions (involving similar issues) simultaneously. The circumstances clearly favored a stay in advance of any decision on the motion for remand. A preliminary examination of jurisdiction did not show decisively that remand was appropriate. Other similar actions had been removed from state court on Securities Litigation Uniform Standards Act (SLUSA) grounds, and plaintiff's complaint could have been construed as asserting claims removable under SLUSA. Judicial economy was best served by leaving the remand motion to the transferee court.

OUTCOME: The court granted the motion for stay of proceedings pending a decision of transfer by the MDL Panel; the court denied plaintiff's motion for remand without prejudice.

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Removal > Proceedings > General Overview
Civil Procedure > Judgments > Entry of Judgments > Stays of Proceedings > General Overview
[HN1]A federal district court has the power to consider a defendant's motion for a stay without first determining conclusively that removal was proper and that it has jurisdiction over the merits of the case.

Civil Procedure > Federal & State Interrelationships > Erie Doctrine
Securities Law > Additional Offerings & the Securities Exchange Act of 1934 > Jurisdiction & Scope > Limitations on Remedies
Securities Law > Liability > Private Securities Litigation > Removal
[HN2]Enacted in 1998, the Securities Litigation Uniform Standards Act (SLUSA), amended the Securities Act of 1934 to preclude a private party from bringing a covered class action in federal or state court, based on state law, alleging a misrepresentation or omission of a material fact or the use of any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security. 15 U.S.C.S. § 78bb(f)(1).

Civil Procedure > Federal & State Interrelationships > Erie Doctrine
Securities Law > Additional Offerings & the Securities Exchange Act of 1934 > Jurisdiction & Scope > Limitations on Remedies
Securities Law > Liability > Private Securities Litigation > General Overview
[HN3]See 15 U.S.C.S. § 78bb(f)(1).

Civil Procedure > Class Actions > General Overview
Securities Law > Additional Offerings & the Securities Exchange Act of 1934 > Jurisdiction & Scope > Limitations on Remedies
Securities Law > Liability > Private Securities Litigation > Removal
[HN4]The Securities Litigation Uniform Standards Act (SLUSA) provides for the removal of covered class actions from state to federal court, as follows: any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the federal district court for the district in which the action is pending, and shall be subject to paragraph (1). 15 U.S.C.S. § 78bb (f)(2). Essentially, the removing party must establish that the action is (1) a covered class action, (2) that is based on state law, (3) alleging a misrepresentation or omission of a material fact or use of any manipulative or deceptive device or contrivance (4) in connection with or involving, for removal purposes (5) the purchase or sale of a covered security. 15 U.S.C.S. § 78bb(f)(1).

Securities Law > Additional Offerings & the Securities Exchange Act of 1934 > Jurisdiction & Scope > Limitations on Remedies
Securities Law > Self-Regulating Entities > National Association of Securities Dealers
Securities Law > Self-Regulating Entities > National Securities Exchanges > American Stock Exchange
[HN5]Generally, a "covered class action" for purposes of the Securities Litigation Uniform Standards Act (SLUSA) involves common questions of law or fact brought on behalf of more than 50 persons or an action brought on behalf of one or more unnamed parties. 15 U.S.C.S. § 78bb(f)(5)(B). A "covered security" is one that is, inter alia, listed or authorized for listing on the New York Stock Exchange, the American Stock Exchange, or the NASDAQ Stock Market. 15 U.S.C.S. § 78r(b).

Civil Procedure > Removal > Postremoval Remands > General Overview
Governments > Fiduciary Responsibilities
[HN6]On a motion to remand, a plaintiff's characterization of his claims are not at issue. The issue, rather, is the substance of the claims contained in the complaint, not the particular semblance in which it is cloaked.

Securities Law > Liability > Advisers, Brokers & Dealers > General Overview
Securities Law > Liability > Private Securities Litigation > General Overview
Securities Law > Liability > Securities Exchange Act of 1934 Actions > Implied Private Rights of Action > Elements of Proof > Connection Requirement
[HN7]Deceptions "in connection with" purchases or sales of securities are not limited to those that induce transactions or refer to the value of securities; and it is not inconceivable that the concealment of a defendant's market timing trades would amount to deception in connection with purchases or sales for the purposes of the Securities Litigation Uniform Standards Act (SLUSA).

COUNSEL: For Plaintiff: Jean-Marc Zimmerman, Esq., Eduard Korsinsky, Esq., ZIMMERMAN, LEVI & KORSINSKY, L.L.P., New York, NY.

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For Canary Capital Partners, LLC and Canary Investment Management, LLC, Defendants: Robert J. Jossen, Esq., Adam B.Rowland, Esq., SWIDLER BERLING SHEEREFF FRIEDMAN, LLP, New York, NY.

JUDGES: Dickinson R. Debevoise, U.S.S.D.J.

OPINION BY: Dickinson R. Debevoise

OPINION

DEBEVOISE, Senior District Judge

This action, removed from the Superior Court of New Jersey, is one of many pending cases in numerous courts across the country in which plaintiffs allege that defendants (here Janus Capital Group, Inc.; Janus Capital Management, [*2] LLC; Canary Capital Partners, LLC; and Canary Investment Management, LLC [1]) either engaged in or permitted improper trading (including "market timing") in mutual fund shares. Janus has moved before the Judicial Panel on Multidistrict Litigation for transfer of the numerous cases filed against it involving market timing allegations; and it has moved before this Court for a stay of proceedings pending a decision on transfer by the MDL Panel. Plaintiff has moved for remand to the Superior Court. Canary has joined Janus's motion for a stay and joined in its opposition to the motion for remand. Because it appears that the interests of judicial economy will be best served by a stay, with little or no disadvantage to Plaintiff, the motion for a stay of proceedings will be granted, and the motion for remand will be denied without prejudice.

1 Janus Capital Group, Inc., and Janus Capital Management, LLC, will be referred to collectively as "Janus"; Canary Capital Partners, LLC; and Canary Investment Management, LLC, will be referred to collectively as "Canary."

[*3] **BACKGROUND**

Janus is an asset management firm that markets and manages mutual funds. Plaintiff was at relevant times (according to the Complaint) an investor in certain of Janus's mutual funds. The Complaint alleges that between September 4, 1999 and September 4, 2002 Janus permitted Canary, an investor and a privileged customer, to engage in market timing - rapid trading that permitted it to take advantage of inefficiencies in the pricing system for mutual fund shares, ultimately at the expense of other investors in the funds. Despite that fact that the prospectus for the affected funds stated that such trading activities would not be permitted, Janus allegedly allowed Canary to engage in market timing in exchange for Canary's depositing assets in a Janus money market fund (assets which generated management fees for Janus).

Plaintiff brings suit on behalf of "all investors in the Funds from September 5, 1999 through September 4, 2003 ... who have been damaged by the defendants' actions." He asserts claims against Janus for breach of fiduciary duty and breach of contract (Counts I and III of the Complaint) and against Canary for aiding and abetting Janus's breach of fiduciary [*4] duty and for tortious interference with contract (Counts II and IV). The fiduciary breach claim asserts that Janus breached its duty as manager and adviser of the funds to act with "good faith, loyalty, fair dealing, and candor." The breach of contract claim alleges that the class members were "induced to purchase shares in the Funds in part as a result of promises by Janus in its prospectus to prevent market timing and excessive trading activity in its funds and enforce the 'Excessive Trading Policy' outlined in the prospectus distributed by Janus in connection with its mutual funds." The breach of contract claim also describes the prospectus as outlining a contract in which Janus agreed to treat investors equally.

Janus and Canary have both moved before the MDL to have the market timing cases involving them transferred to a single district. Some of the cases within the scope of the transfer motions are actions that have been removed from state court. [2]

2 Janus notes in its Consolidated Reply in support of its stay motion that stays have been granted in four cases that were removed from state court; and the reply brief it submitted to the MDL in support of its transfer motion lists seven cases (including this one) that it has removed from state court invoking the Securities Litigation Uniform Standards Act ("SLUSA"). (The brief submitted to the MDL is attached to the Consolidated Reply.)

[*5] **DISCUSSION**

Not surprisingly, the parties disagree on the threshold issue of which of their motions should be decided first. Plaintiff apparently concedes, correctly, that [HN1]the Court has the power to consider Janus's motion for a stay without first determining conclusively that removal was proper and that it has jurisdiction over the merits of the case. See In re Ivy, 901 F.2d 7 (2d Cir. 1990) (holding that the MDL Panel could transfer a case even though a jurisdictional objection was pending). Plaintiff contends, however, that this is not a case where it would be appropriate to postpone consideration of the remand motion. [3] Defendants' position is that deferring consideration of the remand motion will permit the most efficient possible use of the courts' (and the parties') resources because if the MDL Panel transfers this and other similar removed cases, the transferee court will be able to consider several remand motions (involving similar issues) simultaneously.

3 Plaintiff has made it clear that he would not oppose a stay of proceedings if his remand motion were denied.

[*6] The circumstances of the present case clearly favor a stay in advance of any decision on the motion for remand. An immediate stay will permit the most efficient possible use of the courts' and the parties' resources, and it will eliminate the danger that a decision on this remand motion might be inconsistent with decisions by other courts on similar questions. If the relevant jurisdictional considerations clearly favored Plaintiff, or if there were no cases likely to present similar jurisdictional issues before a transferee court, it might be appropriate to address and grant the remand motion immediately. [4] Cf. Meyers v. Bayer AG, 143 F. Supp. 2d 1044, 1048-49 (E.D. Wis. 2001) (concluding that a court faced with simultaneous remand and stay motions should assess the difficulty of issues relevant to remand and determine whether similar issues have been raised in other cases that have been or may be transferred). If remand were patently appropriate, the Court could grant Plaintiff's motion without expending significant time or effort on the analysis, allowing the case to proceed in state court, and there would be little danger that the decision to remand would be inconsistent [*7] with other courts' decisions. Alternatively, if no other cases were likely to present similar remand issues to a transferee court, judicial economy would not be served by postponing a decision on remand because a transferee court would not be in a position to resolve several motions by deciding one set of legal issues. Here however a preliminary examination of jurisdiction does not show decisively that remand is appropriate. In fact, Defendants appear to have at least one quite strong argument supporting removal. As for the likelihood that the transferee court will be confronted with similar issues, Defendants state that several class actions have been removed from state court on SLUSA grounds; and given the likely proliferation of cases arising from alleged market timing schemes, it appears highly probably that the application of SLUSA to claims arising from such schemes will be at issue in other cases.

4 It is not as clear that any real benefit would be derived from addressing and *denying* the remand motion if there were an obvious *lack* of jurisdiction. The parties agree that the case should be stayed if it is not remanded; so an immediate denial of the remand motion would not lead to any additional proceedings until a decision on transfer by the MDL Panel. In any event, although, as the discussion below shows, Defendants do seem to have the better of the jurisdictional arguments, their advantage is not so clear and compelling as to permit a quick resolution of the remand motion in their favor.

[*8] Defendants' principal asserted basis for removal is SLUSA. [HN2]Enacted in 1998, SLUSA amended the Securities Act of 1934 to preclude a private party from bringing a "covered class action" in federal or state court, based on state law, alleging a "misrepresentation or omission of a material fact" or the use of "any manipulative or deceptive device or contrivance" "in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1). SLUSA, 15 U.S.C. § 78bb(f)(1) provides as follows:

> [HN3]No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging--
>
> (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security. [5]

SLUSA further provides [HN4]for the removal of covered class actions from state to federal court: "Any covered class action brought in any State court involving a covered security, [*9] as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1)." 15 U.S.C. § 78bb (f)(2). Essentially, the removing party must establish that the action is (1) a "covered class action", (2) that is based on state law, (3) alleging a misrepresentation or omission of a material fact or use of any manipulative or deceptive device or contrivance (4) "in connection with" [or "involving," for removal purposes] (5) the purchase or sale of a covered security. See 15 U.S.C. § 78bb(f)(1).

5 [HN5]Generally, a "covered class action" involves common questions of law or fact brought on behalf of more than 50 persons or an action brought on behalf of one or more unnamed parties. 15 U.S.C. § 78bb(f)(5)(B). A "covered security" is one that is, inter alia, listed or authorized for listing on the New York Stock Exchange, the American Stock Exchange, or the NASDAQ Stock Market. 15 U.S.C. § 78r(b).

[*10] Plaintiff appears to concede that most of the requirements for removal under SLUSA are satisfied

here; but he contends that his case does not allege the required misrepresentation or omission or use of a deceptive device, and that even if it does, any such misrepresentation is not alleged to have taken place in connection with the purchase or sale of a covered security. Plaintiff emphasizes that the Complaint does not on its face assert causes of action labeled as fraud or misrepresentation, and he argues that his claims for breach of contract and breach of fiduciary duty do not involve allegations of deceptive conduct covered by SLUSA.

However, Plaintiff's own general characterizations of his claims do not control the SLUSA analysis, see Prager v. Knight/Trimark Group, Inc., 124 F. Supp. 2d 229, 230 (D.N.J. 2000) [HN6]("Plaintiff's characterization of his claims are not at issue. The issue, rather, is the substance of the claims contained in the complaint, not the particular semblance in which it is cloaked."); and the Complaint might quite readily be construed as asserting claims removable under SLUSA. Among the fiduciary duties that Janus is alleged to have breached [*11] is a duty of candor, and Plaintiff's allegations generally describe a scheme involving, indeed requiring, deception on an enormous scale over a long period of time. Janus allegedly represented to investors, apparently continuously during all relevant times, that it enforced policies preventing market timing and excessive trading, while throughout the class period it actually permitted market timing by preferred customers in exchange for disguised kickbacks. Plaintiff contends that his allegations reach no further than breaches of contract and of fiduciary duty. As Plaintiff would have it, he alleges only that Janus undertook obligations to prevent market timing and then failed to do so - without deceiving investors as to its intentions. But his allegations could also be read to give rise to an inference of deception on Janus's part. The Complaint does not simply describe a sequence of events in which Janus made a promise and then breached it; rather, it depicts a continuing scheme in which Janus purported to maintain its policy against market timing even after it had ceased to enforce that policy for preferred customers. A strong argument can be made that deception was clearly, and [*12] necessarily, part of the alleged market timing arrangement: the scheme could not have continued if ordinary investors had known how they were being taken advantage of. In describing such continuing exploitation of a position of trust, Plaintiff appears to allege deception sufficiently for his claims to be removable under SLUSA, setting forth facts that "give rise to a strong inference" of fraudulent intent. Cf. Prager, 124 F. Supp. 2d at 234 (internal quotation marks omitted).

Plaintiff's alternative argument - that even if it alleges deception, the Complaint does not allege deception "in connection with" the purchase or sale of a covered security for the purposes of SLUSA, is also less than compelling. Plaintiff argues that he asserts claims only on behalf of holders (as opposed to purchasers or sellers) of shares in Janus mutual funds, and that he does not allege that investors were fraudulently induced to purchases their shares. But there are at least two respects in which the Complaint might reasonably be regarded as alleging deception in connection with purchases or sales.

First, the Complaint could be read to include allegations that holders of Janus mutual [*13] fund shares who purchased those shares during the class period were deceived "in connection with" their purchases. The Complaint alleges, at least arguably, that Janus deceived the investing public generally, more or less throughout the class period, as to its policies on market timing; and it does not limit the proposed class to investors who already held shares in Janus mutual funds before that deception began. Accordingly, Janus argues persuasively that the Complaint alleges deception in connection with purchases by class members during the period in which improper market timing was going on.

Second, the Complaint also might fairly be read to allege deception "in connection with" purchases and sales of Janus mutual fund shares by Canary. To be sure, Canary, the purchaser and seller, was not deceived. But the transactions themselves were concealed from other investors, to whom those transactions were allegedly disadvantageous. [HN7]Deceptions "in connection with" purchases or sales of securities are not limited to those that induce transactions or refer to the value of securities; and it is not inconceivable that the concealment of Canary's market timing trades would amount deception [*14] in connection with purchases or sales for the purposes of SLUSA. Cf. S.E.C. v. Zandford, 535 U.S. 813, 819-23, 153 L. Ed. 2d 1, 122 S. Ct. 1899 (2002) (finding the "in connection with" requirement under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 satisfied where a broker secretly appropriated the proceeds of sales of securities from a customer's investment account).

Even though a preliminary examination of the jurisdictional issues does not permit a quick decision in Plaintiff's favor (or even suggest that he is ultimately likely to prevail on the remand motion), [6] it might nevertheless be sensible and appropriate to consider the remand motion immediately if there were no substantial chance that a transferee court would be presented with similar issues in other cases. However here the parties submissions indicate that several class actions removed from state court are among the cases that may ultimately be transferred; and Defendants have apparently invoked SLUSA in removing several cases from state court. Assuming (apparently reasonably) that the removed class actions involve at least broadly similar factual allegations, there is a con-

siderable likelihood that [*15] a transferee court will have to address jurisdictional issues closely resembling those discussed above. Accordingly, judicial economy will be best served by leaving the remand motion to the transferee court. The courts' resources, along with those of the parties (especially the Defendants) will best conserved by a stay; and any prejudice to the Plaintiff from a relatively brief delay in pursuing his claims will be minimal.

6 Janus has advanced grounds for removal other than SLUSA, but because there is a substantial argument for removal under SLUSA, there is no need to address that alternative bases.

CONCLUSION

For the reasons stated above, Defendant Janus's motion for stay of proceedings pending a decision on transfer by the MDL Panel will be granted, and Plaintiff's motion for remand will be denied without prejudice. An appropriate order will be entered.

Dickinson R. Dcbevoise, U.S.S.D.J.

Dated: January 12, 2004

ORDER

This matter having been opened to the Court by motion of [*16] Defendants Janus Capital Group, Inc. and Janus Capital Management, LLC, for a stay of proceedings pending a decision on transfer by the Judicial Panel on Multidisrict Litigation, and by motion of the Plaintiff for remand to the Superior Court of New Jersey, and notice having been given to all parties, in consideration of the submissions and arguments of counsel, and for the reasons set forth in the Court's opinion of even date,

IT IS, on this 12th day of January 2004, ORDERED as follows:

1. The motion for stay of proceedings pending a decision on transfer by the Judicial Panel on Multidisrict Litigation is GRANTED.

2. The motion for remand the Superior Court of New Jersey is DENIED without prejudice.

Dickinson R. Debevoise, U.S.S.D.J.

EXHIBIT B

ARTHUR-MAGNA, INC., Plaintiff, v. DEL-VAL FINANCIAL CORPORATION, et al., Defendants

Civil Action No. 90-4378

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

1991 U.S. Dist. LEXIS 1431

February 1, 1991, Decided
February 4, 1991, Filed

NOTICE: [*1] *NOT FOR PUBLICATION*

COUNSEL: RICHARD D. GREENFIELD, ESQ., MARK C. RIFKIN, ESQ., GREENFIELD & CHIMICLES, Haverford, Pennsylvania, (Attorneys for Plaintiff).

ANDREW T. BERRY, ESQ., McCARTER & ENGLISH, Newark, New Jersey, (Attorneys for Defendant Del-Val Financial Corporation).

Andrew T. Berry, Esquire, McCarter & English, Newark, New Jersey, Attorneys for Defendant Del-Val Financial Corporation.

Melvin C. Garbow, Peter M. Kreindler, Kenneth V. Handal, Craig A. Newman, Jeffrey R. Mendelsohn, Arnold & Porter, New York, New York. Of Counsel: Melvin C. Garbow.

Jody B. Keltz, Ross & Hardies, Somerset, New Jersey, Attorneys for Defendants, Roger D. Stern, Martin, Wright, and Joel Zbar, Peter I. Livingston, Philip Goldstein, Ross & Hardies, New York, New York, Of Counsel, Frederick L. Whitmer, Pitney, Hardin, Kipp & Szuch, Morristown, New Jersey, Attorneys for Defendants, Interstate/Johnson Lane and J. Craighill Redwine.

Ann C. Flannery, Kevin T. Rover, John M. Vassos, Morgan, Lewis & Bockius, New York, New York, Of Counsel.

Kaplan & Kilsheimer, New York, New York -and- I. Stephen Rabin, New York, New York, Attorneys for Plaintiffs, in Rye, et al. v. Del-Val Financial Corp., Civil Action [*2] No. 90 Civ. 7207 (S.D.N.Y.).

Abbey & Ellis, New York, New York, Attorneys for plaintiffs, in Amer v. Roger D. Stern, et al., Civil Action No. 90 Civ. 7028 (S.D.N.Y.).

Tenzer, Greenblatt, Fallon & Kaplan, New York, New York -and- Morris, Rosenthal, Monhait & Gross P.A., Wilmington, Delaware, Attorneys for plaintiffs in Shirley Green Horowitz Revocable Trust, et al. v. Del-Val Financial Corp., et al., Civil Action No. 90-661 (D. Del.).

Goldstein, Till, Lite & Reifen, Newark, New Jersey -and- Stull, Stull & Brody, New York, New York, Attorneys for plaintiffs in Howard Browner v. Del-Val Financial Corp., et al., Civil Action No. 90-4320 (D. N.J.) and Nala Management Corporation Profit Sharing Trust DTD 12-15-90 v. Del-Val Financial Corp., Civil Action No. 90-4630 (D.N.J.).

Kaplan Kilsheimer, New York, New York, Catalano & Sparber, New York, New York, Attorneys for defendants LW Industries and I & J. Wire Corp. in Rita M. Cole, et al. v. Kenbee Management, Inc., et al., Civil Action No. 90 Civ. 7273 (S.D.N.Y.).

Hermann Rogge, New York, New York, Defendant in Rita M. Cole, et al. v. Kenbee Management, Inc., et al., Civil Action No. 90 Civ. 7273 (S.D.N.Y.).

Lowey, [*3] Dannenberg, Bemporad, Brachtl & Selinger, P.C., New York, New York, Attorneys for plaintiffs in Stanley Newman, et al. v. Roger D. Stern, et al., Civil Action No. 90 Civ. 6921 (S.D.N.Y.).

Frankel, Herdwick, Tannenbaum, Fink & Clark, Atlanta, Georgia, Attorneys for Elmon L. Vernier, Jr. in Arthur-Magna, Inc. v. Del-Val Financial Corp., et al., Civil Action No. 90-4378 (D.N.J.).

JUDGES: Alfred M. Wolin, United States District Judge.

OPINION BY: WOLIN

OPINION

OPINION

Before the Court is a motion by defendants to temporarily stay all litigation pending resolution by the Judicial Panel on Multidistrict Litigation ("Jud. Panel Multidist. Lit.") of defendants' motion, pursuant to 28 U.S.C. § 1407, for multidistrict consolidation. For the following reasons, the Court will exercise its discretion in granting the motion.

On December 14, 1990 a motion was filed with the Panel by certain of the defendants seeking transfer of the actions to the Southern District of New York for consolidation of pretrial proceedings pursuant to 28 U.S.C. § 1407.

The power to stay proceedings is discretionary. The Supreme Court has described the power to stay proceedings as "incidental to the power inherent in every court to [*4] manage the schedule of cases on its docket to ensure fair and efficient adjudication." Gold v. Johns Manville Sales Corp., 723 F.2d 1068, 1077 (3rd Cir. 1983) (citing Landis v. North America Co., 299 U.S. 248, 254-255 (1936). The Third Circuit has adhered to the standard that petitioner must "demonstrate a 'clear case of hardship or inequity' if there is even a 'fair possibility' that the stay would work damage on another party." Id. at 1076 (citing Landis, 299 U.S. at 255).

Plaintiffs have themselves admitted that it is not likely that much pretrial discovery will take place between the date of this order and the issuance of the Panel's order on defendants' motion for consolidation. In spite of this admission, plaintiffs have asserted that a temporary stay will constitute a prejudicial delay.

The Court finds that even if a temporary stay can be characterized as a delay prejudicial to plaintiffs, there are considerations of judicial economy and hardship to defendants that are compelling enough to warrant such a delay. Section 1407 of 28 U.S.C. exists for the express purpose of coordination of pretrial proceedings. See 28 U.S.C. § 1407. The actions before this Court [*5] are two of ten actions currently pending in United States District Courts for the District of New Jersey, Southern District of New York, and District of Delaware. The Court notes that the parties and issues of fact are common in all of the actions and that if separate discovery were to go forward, much work would be duplicated.

Plaintiffs argue that Rule 18 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation precludes the grant of a stay. Rule 18 provides as follows:

The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the panel concerning transfer or remand of an action pursuant to 28 U.S.C. 1407 does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court.

R.P. Jud. Panel Multidist. Lit. 18. Plaintiffs assert that the Rule mandates that the district court retain jurisdiction of pretrial proceedings during the pendency of a transfer motion before the Panel. The Court finds, however, that Rule 18 of Procedure merely allows a transferee court to retain jurisdiction over pretrial proceedings [*6] during the pendency of a motion before the Panel if it judges it fair to all of the parties involved to do so. For the reasons cited above, the Court does not find that the balance of hardship weighs in favor of plaintiffs.

Plaintiffs also argue that there is a good chance that the parties will coordinate pretrial discovery. This is outside of the Court's calculation. The Court is to examine the likelihood of duplicative discovery in the event that the parties are free to engage in any discovery practices.

For these reasons, the Court will stay its participation in this litigation.

An appropriate order is attached.

ORDER

For the reasons expressed in the Court's Opinion filed herewith,

It is on this 1st day of February, 1991,

ORDERED that defendant's motion to stay this action pending resolution of defendant's motion for consolidation is granted; and it is further

ORDERED that the parties shall immediately inform the Court of the Multi-District Litigation Panel's decision and the stay shall be lifted.

EXHIBIT C

LEXSEE

Analysis
As of: Sep 22, 2009

SPENCER A. JOHNSON, et al., Plaintiffs, v. AMR CORPORATION, et al., Defendants. RONALD LEWIS, et al., Plaintiffs, v. AMR CORPORATION, et al., Defendants. DONALD MERKEL, et al., Plaintiffs, v. AMR CORPORATION, et al., Defendants. MICHAEL A. PARKER, et al., Plaintiffs, v. AMR CORPORATION, et al., Defendants. CHERYL L. PETERS, et al., Plaintiffs, v. AMR CORPORATION, et al., Defendants. ANN STELLATO, et al., Plaintiffs, v. AMR CORPORATION, et al., Defendants.

Case No.: 95 C 7659, Case No.: 95 C 7660, Case No.: 95 C 7661, Case No.: 95 C 7662, Case No.: 95 C 7663, Case No. 95 C 7664

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1996 U.S. Dist. LEXIS 4172

April 1, 1996, Date
April 3, 1996, DOCKETED

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff survivors and the estates of deceased passengers brought wrongful death suits against defendant corporation, and others, arising from an airplane crash. Defendants claimed that plaintiffs' fraudulent joinder of them necessitated removal to state court.

OVERVIEW: Many of the suits were filed in state court, rather than in federal court, because one of the named defendants was a citizen of Illinois with Illinois also as its principal place of business. The other defendants were Delaware corporations with their principal place of business in Texas. The presence among defendants of the Illinois citizen for diversity purposes affected the forum where the cases could be heard. The parties argued that two judicial bodies, the Executive Committee and the Judicial Panel on Multidistrict Litigation (MDL), had a crucial stake in the proceedings. Plaintiffs urged the court to send the cases back to a particular judge or to the Executive Committee. Defendants urged that the cases should be sent to the MDL. The MDL issued a conditional transfer order transferring to a judge in the Middle District of North Carolina those cases involving common questions of fact concerning the cause or causes of the crash at issue. The court found that sending the cases to the MDL was not mandatory, but it concluded that the benefits of transferring them to the MDL were obvious.

OUTCOME: The court stayed any ruling on all pending motions until the panel ruled on the transfer issue.

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Diversity Jurisdiction > Amount in Controversy > Determinations
Civil Procedure > Jurisdiction > Diversity Jurisdiction > Citizenship > Business Entities
[HN1]In those cases not presenting federal questions under 28 U.S.C.S. § 1331(a), a district judge has jurisdictionnn only over matters in controversy exceeding the value of $ 50,000 between "citizens of different States." 28 U.S.C.S. § 1332(a)(1).

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

[HN2]Jurisdictio est potestas de publico introducta cum necessitate juris dicendi. That is, jurisdictionnn is a power introduced for the public good, on account of the necessity of dispensing justice. Within the federal courts, jurisdictionnn is a concept of fundamental concern. It is a question which a court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.

Civil Procedure > Jurisdiction > Diversity Jurisdiction > Citizenship > General Overview
Civil Procedure > Parties > Joinder > Fraudulent Joinder
Civil Procedure > Parties > Joinder > Misjoinder
[HN3]Congress has taken specific measures to assure that the jurisdictionnnal power of the federal court system is not squandered on cases that do not satisfy the specified requirements. The law looks askance at those who would subvert the intent of Congress by naming as defendants nominal parties with no discernible relationship to the cause of action. This attempt to destroy a federal court's diversity jurisdictionnn, and defendants' right to removal, by suing non-diverse parties actually has its own name: "fraudulent joinder."

Civil Procedure > Jurisdiction > Diversity Jurisdiction > Citizenship > General Overview
Civil Procedure > Parties > Joinder > Fraudulent Joinder
Civil Procedure > Parties > Joinder > Misjoinder
[HN4]In matters concerning jurisdictionnn, "fraudulent" is a term of art for a set of circumstances that preclude plaintiffs from any reasonable possibility of winning their claim in state courts. Federal court must engage in an action of prediction about the chances of plaintiffs' success. If defendants fail to meet their heavy burden of proving there is not any reasonable possibility of plaintiffs' winning, they have not proved fraudulent joinder, and the case must be remanded back to state court for want of diversity.

Civil Procedure > Jurisdiction > Diversity Jurisdiction > Citizenship > General Overview
[HN5]A federal court must decline jurisdictionnn over cases or controversies where the defendants and plaintiffs share the same citizenship. 28 U.S.C.S. § 1332(a)(1).

COUNSEL: [*1] For SPENCER A JOHNSON est Scott A Johnson, THOMAS J KESSINGER est Scott A Johnson, executor plaintiffs (95-CV-7659): Thomas A. Demetrio, [COR LD NTC A], Michael Kelly Demetrio, [COR], David Casey Wise, [COR] Corboy & Demetrio, Chicago, IL. For RONALD LEWIS, DIANE R LEWIS, plaintiffs (95-CV-7660): Thomas A. Demetrio, [COR LD NTC A], Michael Kelly Demetrio, [COR], David Casey Wise, [COR], Corboy & Demetrio, Chicago, IL. For DONALD MERKLE, LOSI MERKEL, plaintiffs (95-CV-7661): Peter C. John, [COR LD NTC A], Matthew Michael Getter, [COR], Hedlund, Hanley & John, Chicago, IL. For MICHAEL A PARKER, Individually est David M Parker, Jr, executor plaintiff (95-CV-7662): Philip H. Corboy, [NTC], Thomas A. Demetrio, [COR LD NTC A], Michael Kelly Demetrio, [COR], David Casey Wise, [COR] Corboy & Demetrio, Chicago, IL. For CHERLY L PETERS, as special administrator est William J Peters, plaintiff (95-CV-7663): Thomas A. Demetrio, [COR LD NTC A], Michael Kelly Demetrio, [COR], David Casey Wise, [COR], Corboy & Demetrio, Chicago, IL. For ANN STELLATO est Salvatore Stellato, executor plaintiff (95-CV-7664): Philip H. Corboy, [NTC], Thomas A. Demetrio, [COR LD NTC A], Michael Kelly Demetrio, [COR], David Casey Wise, [COR], Corboy & Demetrio, Chicago, IL.

For AMR CORPORATION, AMERICAN AIRLINES, INC., a corporation, AMR EAGLE, INC., FLAGSHIP AIRLINES, INC., a corporation, defendants (95-CV-7659): Charles William Douglas, [COR LD NTC A], Sidley & Austin, Chicago, IL. Sara J. Gourley, [COR], Sheila Ann Sundvall, [COR], Sidley & Austin, Chicago, IL. For ALLIEDSIGNAL ENGINES, INC., a corporation, defendant (95-CV-7659): Michael Gerard McQuillen, [COR LD NTC], Mark Samuel Susina, [COR], Adler, Murphy & McQuillen, Chicago, IL. For WOODWARD GOVERNOR COMPANY, a corporation, defendant (95-CV-7659): Michael H. West, [COR LD NTC A], Michael Joseph Clarizio, [COR], Burke, Weaver & Prell, Chicago, IL. For AMR CORPORATION, AMERICAN AIRLINES, INC., a corporation, AMR EAGLE, INC., a corporation, FLAGSHIP AIRLINES, INC., a corporation, defendants (95-CV-7660): Charles William Douglas, [COR LD NTC A], Sidley & Austin, Chicago, IL. Sara J. Gourley, [NTC], Sheila Ann Sundvall, [NTC], Sidley & Austin, Chicago, IL. For ALLIEDSIGNAL INC., a corporation, defendant (95-CV-7660): Michael Gerard McQuillen, [COR LD NTC A], Mark Samuel Susina, [COR], Adler, Murphy & McQuillen, Chicago, IL. For WOODWARD GOVERNOR COMPANY, a corporation, defendant (95-CV-7660): Michael H. West, [COR LD NTC A], Michael Joseph Clarizio, [COR], Burke, Weaver & Prell, Chicago, IL. For AMR CORPORATION, AMERICAN AIRLINES, INC., a corp., AMR EAGLE, INC., a corp., FLAGSHIP AIRLINES, INC., a corp., FLAGSHIP AIRLINES, INC., a corp., defendants (95-CV-7661): Sara J. Gourley, [COR LD NTC A], Sheila Ann Sund-

vall, [COR], Sidley & Austin, Chicago, IL. For ALLIEDSIGNAL ENGINES, INC., a corp., defendant (95-CV-7661): Sara J. Gourley, [COR LD NTC A], Sheila Ann Sundvall, [COR], Sidley & Austin, Chicago, IL. Michael Gerard McQuillen, [COR], Mark Samuel Susina, [COR], Adler, Murphy & McQuillen, Chicago, IL. For WOODWARD GOVERNOR COMPANY, a corp., defendant (95-CV-7661): Michael H. West, [COR], Michael Joseph Clarizio, [COR], Burke, Weaver & Prell, Chicago, IL. Sara J. Gourley, [COR LD NTC A], Sheila Ann Sundvall, [COR], Sidley & Austin, Chicago, IL. For AMR CORPORATION, AMERICAN AIRLINES, INC., a corporation, AMR EAGLE, INC., FLAGSHIP AIRLINES, INC., a corporation, defendants (95-CV-7662): Sara J. Gourley, [COR LD NTC A], Sheila Ann Sundvall, [COR], Sidley & Austin, Chicago, IL. For ALLIEDSIGNAL ENGINES, INC., a corporation, defendant (95-CV-7662): Michael Gerard McQuillen, [COR LD NTC A], Mark Samuel Susina, [COR], Adler, Murphy & McQuillen, Chicago, IL. For WOODWARD GOVERNOR COMPANY, a corporation, defendant (95-CV-7662): Michael H. West, [COR LD NTC A], Michael Joseph Clarizio, [COR], Burke, Weaver & Prell, Chicago, IL. For AMR CORPORATION, AMERICAN AIRLINES, INC., a corporation, AMR EAGLE, INC., a corporation, FLAGSHIP AIRLINES, INC., a corporation, defendants (95-CV-7663): Charles William Douglas, [COR LD NTC A], Sidley & Austin, Chicago, IL. Sara J. Gourley, [COR], Sheila Ann Sundvall, [COR], Sidley & Austin, Chicago, IL. For ALLIEDSIGNAL ENGINES, INC., a corporation, defendant (95-CV-7663): Michael Gerard McQuillen, [COR LD NTC A], Mark Samuel Susina, [COR], Adler, Murphy & McQuillen, Chicago, IL. For WOODWARD GOVERNOR COMPANY, a corporation, defendant (95-CV-7663): Michael H. West, [COR LD NTC A], Michael Joseph Clarizio, [COR], Burke, Weaver & Prell, Chicago, IL. For AMR CORPORATION, AMERICAN AIRLINES, INC., a corporation, AMR EAGLE, INC., a corporation, FLAGSHIP AIRLINES, INC., a corporation, defendants (95-CV-7664): Sara J. Gourley, [COR LD NTC A], Sheila Ann Sundvall, [COR], Sidley & Austin, Chicago, IL. For ALLIEDSIGNAL ENGINES, INC., a corporation, defendant (95-CV-7664): Michael Gerard McQuillen, [COR LD NTC A], Mark Samuel Susina, [COR], Adler, Murphy & McQuillen, Chicago, IL. For WOODWARD GOVERNOR COMPANY, a corporation, defendant (95-CV-7664): Michael H. West, [COR LD NTC A], Michael Joseph Clarizio, [COR], Burke, Weaver & Prell, Chicago, IL.

JUDGES: James B. Zagel, United States District Judge

OPINION BY: James B. Zagel

OPINION

MEMORANDUM OPINION AND ORDER

The little black box that survived the impact of the crash in Durham, North Carolina on 13 December 1995 records for posterity the last sounds from the last seconds of American Eagle Flight 3379:

1833:33.3

HOT-1 why's that ignition light on? we just had a flame out?

1833:38.4

HOT-2 I'm not sure what's goin' on with it.

1833:39.8

HOT-1 we had a flame out.

1833:40.7

CAM [low frequency beat sound similar to propellers rotating out of synchronization starts and continues for approximately eight seconds]

1833:41.4

HOT-2 'K, you got it?

1833:42.5

HOT-1 yeah.

1833:42.8

HOT-2 we lose an engine?

1833:43.6

HOT-1 OK, yeah.

1833:45.2

HOT-1 OK,uh...

1833:46.0

HOT-2 I'm gonna turn that...

1833:46.5

HOT-1 see if that, turn on the auto...

1833:48.2

HOT-2 I'm goin' to turn on, both uh...ignitions, OK?

1833:51.5

HOT-1 OK.

1833:54.2

HOT-2 we lose that en' left one?

1833:55.9

HOT-1 yeah.

1833:58.9 watta you want me to do you gonna continue?

. . .

1834:03.7

CAM [low frequency beat sound similar [*2] to propellers rotating out of synchronization starts and continues for approximately three seconds]

. . .

1834:05.3

CAM [sound similar to single stall warning horn starts and continues for 0.7 seconds]

. . .

1834:09.8

HOT-2 you got it?

1834:10.8

HOT-1 yeah.

1834:12.2

HOT-2 lower the nose.

1834:13.0

CAM [unidentified rattling sound)

1834:13.2

HOT-2 it's the wrong, wrong foot, wrong engine*.

1834:14.7

CAM [sound similar to dual stall warning horns stop]

1834:14.8

CAM [low frequency beat sound similar to propellers rotating out of synchronization starts and continues for approximately four seconds]

1834:14.9

CAM [sound similar to single stall warning horn stops]

1834:16.1

CAM [sound similar to dual stall warning horns start]

1834:16.3

HOT-B [sound of heavy breathing]

1834:17.6

CAM [sounds similar to dual stall warning horns stop and single horn continues]

1834:18.2

CAM [sound similar to dual stall warning horns start]

1834:18.9

HOT-2 here.

. . .

1834:24.4

CAM [sound of impact]

1834:24.6

END OF RECORDING

END OF TRANSCRIPT

End, tragically, of Flight 3379.

[*3] Five people survived both the impact and the ensuing fire which engulfed the Flagship Airlines Jetstream 3201 doing business that day as Flight 3379. Thirteen passengers and two crew members died. Since liability often follows hard upon the heels of tragedy, the incident ignited a spate of wrongful death suits filed by the survivors and the estates of the deceased passengers. Many of these suits were filed in the Cook County Circuit Court, rather than in federal court, because one of the named Defendants--Woodward Governor Company--is a citizen of Illinois with Illinois also as its principal place of business.

The other Defendants--AMR Corporation, Inc; American Airlines, Inc; AMR Eagle, Inc.; Flagship Airlines, Inc.; and Allied Signal Engines, Inc.--are not from Illinois. They are Delaware Corporations with their principal place of business in Texas. The presence among Defendants of Woodward Governor--an Illinois citizen for diversity purposes--affects the forum where these cases may be heard. [HN1]In those cases not presenting federal questions under 28 U.S.C. 1331(a), a district judge has jurisdictionnn only over matters in controversy exceeding the value of $ 50,000 between "citizens [*4] of different States." 28 U.S.C. § 1332(a)(1).

[HN2]*Jurisdictio est potestas de publico introducta cum necessitate juris dicendi.* That is, jurisdictionnn is a power introduced for the public good, on account of the necessity of dispensing justice. Black's Law Dictionary 853 (6th ed. 1990). Within the federal courts, jurisdictionnn is a concept of fundamental concern. Mansfield, Coldwater & Lake Michigan Railway Co. v. Swan, 111 U.S. 379, 382, 28 L. Ed. 462, 4 S. Ct. 510 (1884). It is a question which a court "is bound to ask and answer for

itself, even when not otherwise suggested, and without respect to the relation of the parties to it." Id.

[HN3]Congress has taken specific measures to assure that the jurisdictionnnal power of the federal court system is not squandered on cases which do not satisfy the specified requirements. The law looks askance at those who would subvert the intent of Congress "by naming as Defendants nominal parties with no discernible relationship to the cause of action." Id. (citing 14A Wright, Miller & Cooper, Federal Practice & Procedure § 3723, at 342 (1985). This attempt to destroy a federal court's diversity jurisdictionnn (and Defendants' right to removal) by suing non-diverse [*5] parties actually has its own name: "fraudulent joinder."

Before 1992, the Seventh Circuit had "never before addressed fraudulent joinder." Poulos & A.G.P. v. Naas Foods, Inc., 959 F.2d 69, 73 (7th Cir. 1992). When it finally had occasion to, it explained that [HN4]in matters concerning jurisdictionnn, "fraudulent" is a "term of art" for a set of circumstances that preclude Plaintiffs from any reasonable possibility of winning their claim in state courts. Id. Federal court "must engage in an action of prediction" about the chances of Plaintiffs' success. If Defendants fail to meet their "heavy burden" of proving there is not "any reasonable possibility" of Plaintiffs' winning, they have not proved fraudulent joinder, and the case must be remanded back to state court for want of diversity.

I am the second judge in the Northern District of Illinois who has heard Defendants plead that Plaintiffs' fraudulent joinder of one of them mandates removal to state court. The first was Judge Ann Claire Williams, my immediate neighbor in district court, who heard them in the summer of 1995. The arguments she heard then were identical to the ones I hear now.

But before Judge Williams or I heard [*6] Defendants plead fraudulent joinder in the Northern District of Illinois, these cases were entrusted to Judge Judith Cohen of the Circuit Court of Cook County. Judge Cohen, however, did not have them for long; Defendants removed the cases to Judge Williams. The Defendants do offer a slightly better case for fraudulent joinder. It would be a very much better case if one could consider the NTSB Final Aircraft Accident Report, but I doubt that one can so consider it. 42 U.S.C. § 761(e).

[HN5]A federal court must decline jurisdictionnn over cases or controversies where the Defendants and Plaintiffs share the same citizenship. 28 U.S.C. § 1332(a)(1). [1] This is exactly what Judge Williams did; she dismissed the cases for want of complete diversity, [2] unavoidably lobbing them once again in the direction of Cook County.

1 Moreover, Judge Williams recognized what some would not: in attempting to prove that the engines and propeller governors functioned perfectly on the day of the crash, Defendants mistakenly confused those facts which go to the merits with those facts which establish jurisdictionnn:

> The removing Defendants have missed the fine distinction between considering summary judgment-type evidence (which the court can do) and making a summary judgment-type determination (which it cannot).

[*7]

2 See Judge Williams' Memorandum Opinion and Order of 12 January 1995 at 12-13 ("In sum it is possible that a state court could find Woodward at least partly responsible for this air crash. Since a cause of action against Woodward might be sustained in a state court, there was no fraudulent joinder. Therefore, for the reasons set forth . . . this cause, having been removed improvidently without jurisdictionnn is remanded to the Circuit Court of Cook County.").

Judge Cohen barely had them in her grasp again when Defendants moved to re-remove the cases back to federal court on 28 December 1995.

I fear that the tenacity of the parties and the nature of the federal diversity requirement have combined to make the judges of both state and federal governments unwilling participants in a game of judicial "Hot Potato," undignified because such goings-on insensitively denigrate the memory of whose loss of life was the catalyst for the present actions.

As if Judge Williams, Judge Cohen, and myself did not offer enough potential forums, the parties now argue that two judicial bodies--The Executive [*8] Committee and the Judicial Panel on Multidistrict Litigation (MDL)--have a crucial stake in the proceedings. Citing procedural irregularities in the re-filing of these cases in District Court, [3] Plaintiffs urged me to send these cases back to Judge Williams, or, failing that, to the Executive Committee (who they hope will then send the cases to Judge Williams after an investigation). See Plaintiffs' Emergency Motion for Assignment to the Calendar of the Executive Committee for Refiling and/or Reassignment and also their Motion to Remand.

3 Plaintiffs make much ado about what undoubtedly were procedural irregularities in the refiling of this case in district court. These cases

may or may not have been mistakenly assigned to myself rather than Judge Williams, but all this is beside the point. Do not mistake me: the improper docketing and assignment of cases is a matter of no little consequence, and the court cannot remain impervious to evidence that nefarious motives adulterate the neutrality of the random case assignment system. But even if this court had the time, inclination, and resources to launch a full scale investigation, this would all still be not only beside the point, it would obscure the point, which is finding an appropriate forum for the prompt resolution of this dispute.

[*9] No, say Defendants, what you must do is send the cases to the MDL. The MDL, after all, found centralization of Flight 3379 cases in the Middle District of North Carolina "desirable" to avoid duplication of discovery, inconsistent pretrial rulings, and the unnecessary depletion of the resources of all parties involved. See 28 U.S.C. § 1407. Acting on this finding, the seven experienced judges of the MDL issued a conditional Transfer Order on 20 December 1995 transferring to Judge Richard C. Erwin in the Middle District of North Carolina those cases involving "common questions of fact concerning the cause or causes of the December 13, 1994 crash of American Eagle Flight 3379 near Morrisville, North Carolina." [4] Docket No. 1084, Conditional Transfer Order (CT0-2), Judicial Panel on Multidistrict litigation, In re Air Crash Near Morrisville, North Carolina, on December 13, 1994, filed 26 January 1996.

4 This specifically included the six cases before me now.

But is the MDL's authority to transfer these [*10] cases not impeded by the jurisdictionnnal objections currently pending before me? No. See In re Ivy, 901 F.2d 7, 8-10 (2d Cir. 1990). The "sole issue" before the Ivy Court was "the merits of the transfer viewed against the purposes of the multidistrict statutory scheme, whether or not there is a pending jurisdictionnnal objection." Id. at 9. After balancing these considerations, the Ivy Court upheld the MDL's "jurisdictionnn to transfer a case in which a jurisdictionnnal objection is pending." See also In re Federal Election Campaign Act Litigation, 511 F. Supp. 821, 823-24 (J.P.M.L. 1979) (Panel transferred actions despite pendency of motions to dismiss for lack of subject matter jurisdictionnn). Sending these cases to the MDL is not mandatory. But the benefits of transferring them to the MDL--the body established by Congress specifically to ameliorate the duplicative litigation and the valuable waste of judicial resources--are obvious: "Once transferred, the jurisdictionnnal objections can be heard and resolved by a single court and reviewed at the appellate level in due course." Id. at 9. The rewards of this approach are consistency and economy.

This is where things [*11] stand at the moment with the cases before me: Defendants' brief in opposition to Plaintiffs' Motion to vacate the conditional transfer order is due to be filed on 14 March 1996 and the MDL Panel is expected to rule shortly thereafter. Judge Erwin, the MDL transferee judge, has postponed scheduling the first pretrial conference in the previously transferred cases until sometime prior to 1 June 1996 in order to give the MDL Panel an opportunity to rule on the transfer of these six additional cases.

Since the MDL will soon be looking at the forest as well as the trees, the best course is to postpone ruling on the present motions (damages discovery in these cases is ongoing, and will not be delayed, and no liability discovery has been taken) and allow the MDL panel to determine whether to make its conditional order final. If the cases are transferred, it is far better for Judge Erwin to resolve the jurisdictionnnal question.

I therefore stay any ruling on the instant motions until the Panel rules on the transfer issue. See e.g., Stay Order entered by N.D. Texas in Leech v. AMR Corp, et. al., No. 395-CV-2502-G. Hopefully, the MDL will be able to provide a fitting ending to the road [*12] tour of the long-running drama, "Six Cases in Search of a Forum." Prior to issuance of this opinion, I have tendered the draft to Judge Williams who has authorized me to say she concurs in this disposition.

Enter:

James B. Zagel

United States District Judge

Date: APR - 1 1996